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SUPREME COURT OF THE UNITED STATES

October Term 1954.

No. [redacted] 62

RAY WHITAKER and HARRY L. SWAIM, Doing Business as BLUE MOTOR COACH LINES, - - - - - - - - - Appellants,

versus

LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - Appellees.

On Appeal from the Court of Appeals of Kentucky.

MOTION TO DISMISS
AND
BRIEF IN SUPPORT THEREOF
OF
LOUISVILLE TRANSIT CO., APPELLEE.

JOHN E. TARRANT,
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Louisville 2, Ky.,
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Counsel for Appellee, Louisville Transit Co.

BULLITT, DAWSON & TARRANT,
Of Counsel.

Dated June 1, 1955.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term 1954.

No. 774.

RAY WHITAKER and HARRY L. SWAIM, Doing Business as BLUE MOTOR COACH LINES, *Appellants,*

v.

LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - - - - - *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS.

Louisville Transit Co., appellee herein, moves this Court to dismiss with costs the appeal taken herein to this Court by Ray Whitaker and Harry L. Swaim, doing business as Blue Motor Coach Lines, appellants, upon the ground that the appeal does not present a substantial Federal question; and in support thereof files herewith its brief.

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EARL S. WILSON,
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Louisville Transit Co.

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Dated June 1, 1955.

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BRIEF FOR LOUISVILLE TRANSIT CO., APPELLEE, IN SUPPORT OF MOTION TO DISMISS.

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Dated June 1, 1955.

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LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - - - - - *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

BRIEF OF APPELLEE, LOUISVILLE TRANSIT CO., IN SUPPORT OF MOTION TO DISMISS.

THE QUESTION.

Blue Motor's appeal herein presents no substantial Federal question.

In 1935, Blue Motor received from the proper Kentucky State agency an annually renewable common carrier certificate authorizing it to operate motor busses "from Louisville to Camp Taylor," an adjacent unin-

corporated area, but not authorizing it to engage in *intracity* operations in Louisville. At that time, *Kentucky Constitution* §§s 163 and 164 (adopted 1891) provided, as held in *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055 (decided 1927), that no motor bus operator could engage in intracity transportation of passengers in Louisville without first obtaining a franchise from Louisville; the *Kentucky Annexation Statutes,* Acts 1893 c. 244, now *KRS* 81.100, *et seq.,* permitted Louisville to annex adjacent unincorporated areas, as it did the Camp Taylor area in 1950; and under the settled law of Kentucky those constitutional and statutory provisions became a part of Blue Motor's certificate as fully as if written therein.

Blue Motor's certificate was thus issued, acquired and held (1) subject to the possibility that Louisville might annex the Camp Taylor area, and (2) subject to the condition that, if Louisville did so, Blue Motor could no longer operate therein without obtaining a franchise from Louisville. Consequently, there could be no impairment of contract or deprivation of property without due process when, upon annexation of the Camp Taylor area by Louisville in 1950, Blue Motor lost its right to operate therein unless it acquired a franchise from Louisville.

STATEMENT OF THE CASE.

1. Blue Motor's Certificate and Service.

In 1935, Blue Motor obtained a common carrier certificate renewable annually authorizing it to render passenger service by bus "*from* Louisville *to* Camp Taylor," an adjacent unincorporated area, but not authorizing it to engage in any *intracity* carriage of passengers within Louisville.

On June 30, 1950, Louisville annexed the greater part of the Camp Taylor area.

For many years, Blue Motor's service in the Camp Taylor area had been inadequate and the residents of Camp Taylor had repeatedly urged and petitioned Louisville Transit Co. to extend its city-wide service into Camp Taylor.[1] As a result of this pressure from the Camp Taylor area, on January 28, 1951, Louisville Transit Co., under its city-wide franchise requiring it to furnish city-wide service, and pursuant to specific authorization from Louisville, extended its lines into Camp Taylor.

2. The Proceedings Below.

On February 7, 1951, Blue Motor for the first time applied to the Department of Motor Transportation of the Commonwealth of Kentucky for a "City Bus Certificate" to engage in intracity transportation in the Camp Taylor area.[2]

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[1]R 349-350, 419-421, 430-431, 434-436, 437.
[2]R 291.

On February 12, 1951, Louisville Transit Co. protested Blue Motor's application for a "City Bus Certificate" on the ground that Blue Motor had not obtained a franchise from Louisville, and on February 27, 1951, filed a more elaborate protest.[3]

On February 28, 1951, the Department issued the City Bus Certificate to Blue Motor.[4] Thereafter Louisville Transit Co. moved the Department to cancel the City Bus Certificate illegally issued to Blue Motor, but after a full hearing the Department declined to do so, saying in its order[5]:

> "The only remaining issue concerns the fact that Blue Motor is conducting a city bus operation within the corporate limits of the City without possessing a franchise in accordance with Section 163 and 164 of the *Constitution of Kentucky.* Although the Commissioner fully realizes that it is his duty * * * to uphold all provisions of the *Constitution of Kentucky,* he feels * * * that the absence of a franchise in the present case is a matter which lies between the City and Blue Motor * * *. Therefore, the Commissioner does not rule upon this issue."

On March 24, 1952, Louisville Transit Co. appealed to the Franklin Circuit Court from the order of the Department.

On October 2, 1953, the Franklin Circuit Court held that the Department had erroneously issued to Blue

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[3]R 175-177, 179-187.
[4]Ex. 3, R 288, 449.
[5]R 280.

Motor a City Bus Certificate and cancelled that certificate, saying[6]:

> "Blue Motor had no right to engage in intracity transportation of passengers for hire in the Camp Taylor area of Louisville, which area was annexed and became a part of Louisville on June 30, 1950. The Department erroneously issued to Blue Motor City Bus Certificate No. 800, which purported to authorize Blue Motor to engage in intracity transportation of passengers for hire in the said Camp Taylor area of Louisville. The Department erroneously held that Blue Motor was entitled to continue to hold such certificate and to engage in such transportation. A franchise from Louisville was, and is, a prerequisite under both the *Kentucky Constitution* and the Kentucky Statutes to engage in such intracity transportation. Blue Motor held no such franchise and said certicate was and is void and all operations thereunder were and are illegal.
>
> WHEREFORE, it is ordered and adjudged:
>
> (a) That said City Bus Certificate No. 800 and any renewal thereof be and the same is hereby set aside, cancelled and held for naught and Blue Motor is ordered and directed immediately to surrender said certificate to the Department for cancellation and immediately to discontinue any and all intracity transportation of passengers for hire in Louisville over any of the routes specified in said City Bus Certificate No. 800."

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[6]R 95-96.

On January 10, 1955, the Kentucky Court of Appeals affirmed the judgment of the Franklin Circuit Court.

Blue Motor appealed to this Court.

3. *The Kentucky Law Which Became a Part of Blue Motor's Certificate When Issued in 1935.*

Prior to the issuance to Blue Motor in 1935 of a certificate authorizing it to operate busses from Louisville to the then unincorporated adjacent Camp Taylor area, but *not authorizing any intracity carriage* of passengers within Louisville, the Kentucky Court of Appeals in *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055 (decided 1927), had held that Louisville Railway Co., which was subsequently consolidated into Louisville Transit Co. and which held a city-wide franchise from Louisville, could enjoin People's Transit Co., which had no city franchise, from operating a competing bus line for the *intracity* carriage of passengers for hire within Louisville and pointed out that *Kentucky Constitution* §§s 163 and 164 (adopted in 1891) required a bus company to obtain a city franchise from Louisville before engaging in intracity transportation within Louisville. In speaking of *Kentucky Constitution* §§s 163 and 164 the Kentucky Court of Appeals said (295 S. W. 1058, 1060):

> "The one [*Ky. Const.* § 163] withheld the right of the Legislature to grant the franchise for purely intraurban operations, and conferred that right exclusively upon the city authorities, while the other [*Ky. Const.* § 164] prescribed a mandatory method

by which the municipality might create and grant the franchise to be operated exclusively, or substantially so, within its corporate limits. * * *

"There is, therefore, no room for the contention that defendant, while engaged in the operation of its busses over the streets of Louisville in the manner hereinbefore pointed out was not doing so in the exercise of such a franchise as was and is contemplated by section 164, *supra,* of our *Constitution.* * * *

"We therefore conclude that the operation of defendant's busses over the streets of the city in the manner and for the purpose indicated, * * * was such a use of the streets for the purpose of performing such a public service as required it to obtain a franchise as prescribed in section 164 of the *Constitution,* * * *."

In 1927, concerning these same constitutional provisions, a three-judge Federal Court in *Union Light, Heat & Power Co.* v. *Railroad Commission,* 17 F. 2d 143, had said (17 F. 2d 148):

"These two sections of the *Constitution* took away from the General Assembly the power to grant local franchises, and expressly vested that power in the municipalities of the state."

In this Blue Motor case, the Kentucky Court of Appeals said (274 S. W. 2d 392, 394, 395):

"*Kentucky Constitution,* sections 163 and 164 as construed by this court in *People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055, confer upon cities the right of final decision as to whether a public utility may use or occupy the city streets for an intra-city service. * * *

"It seems to us the logical starting point is the *Kentucky Constitution,* sections 163 and 164. It is clear from these two sections that the framers of the Constitution intended to confer upon cities the final right to decide whether a public utility may use or occupy the streets for an intra-city service. As already mentioned, this court so held in the *People's Transit Co.* case, 220 Ky. 728, 295 S. W. 1055. * * *

"If we were to uphold the right of Blue Motor to render bus service within the city limits of Louisville without first obtaining a franchise from the city, we would be in the anomalous position of approving something which is expressly prohibited by sections 163 and 164 of the *Constitution.*"

On July 1, 1893, the statute (now *KRS* 81.100 *et seq.*) authorizing Louisville to annex adjacent territory became effective and has continuously remained in effect since that time.

Since 1890, Louisville Transit Co. and its principal predecessor, Louisville Railway Co., have held franchises from Louisville authorizing and obligating them to furnish *city-wide intracity* transportation of passengers.

In 1906 the Kentucky Court of Appeals in *Truesdale* v. *City of Newport,* 28 K. L. R. 840, 90 S. W. 589, stated that a city-wide franchise, even though silent as to territory subsequently annexed, covered that territory. In its opinion, in this *Blue Motor* case the Kentucky Court of Appeals said (274 S. W. 2d 394):

"Moreover, there can be no doubt that Transit's franchise covers not only the territory within

> the boundaries of the city at the time the franchise was let, but also such additional territory as may from time to time be annexed by the city. In *Truesdale* v. *City of Newport, Ky.*, 90 S. W. 589, 590, it was said 'the limits of the city year by year determine the limits of the contract.' "

It is thus to be noted that in 1935, when Blue Motor first obtained from the proper State agency its one year annually renewable certificate, permitting operations "from Louisville to Camp Taylor" *but not intracity within Louisville,*

(1) The presently existing Kentucky Annexation Statutes provided that Louisville could annex that area,

(2) The Kentucky Court of Appeals in 1906 had held in the *Truesdale* case that, if Louisville did annex that area, Louisville Transit Co.'s city-wide franchise extended to that area,

(3) The Kentucky Court of Appeals in 1927 had held in the *People's Transit* case that *Kentucky Constitution* §§s 163 and 164 required any person desiring to furnish *intracity* motor bus service in Louisville to obtain a franchise from Louisville before doing so, and

(4) The Kentucky Court of Appeals had likewise held in the same *People's Transit* case that Louisville Transit Co.'s predecessor could enjoin the operation of competing intracity motor busses by persons not holding a franchise from Louisville.

(5) These contingencies became integral parts of Blue Motor's certificate when it was issued as fully as if they had been written therein.

Concerning this the Kentucky Court of Appeals said in this *Blue Motor* case (274 S. W. 2d 394):

> "It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract."

The Kentucky Court of Appeals had so held in 1897 in *Deposit Bank of Owensboro* v. *Daviess County,* 102 Ky. 174, 39 S. W. 1030; in 1900 in *Williams* v. *Nall,* 108 Ky. 21, 55 S. W. 706; and in 1923 in *City of Henderson* v. *Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332.

4. The Essence of This Blue Motor Decision.

The Kentucky Court of Appeals simply held that before Blue Motor can engage in *intracity* transportation in Louisville it must obtain a franchise from Louisville as is required by *Kentucky Constitution* §§s 163 and 164 (adopted in 1891), which were in force at the time Blue Motor's certificate was initially issued and therefore, in effect, were written into Blue Motor's certificate when issued. The Kentucky Court of Appeals has thus only held that Blue Motor must comply with a condition subject to which its certificate was issued.

Surely there can be no violation of the Federal Constitution by requiring Blue Motor to comply with *Kentucky Constitution* §§s 163 and 164 which had been in

effect for 44 years before its certificate was issued; were in effect at the time of its issuance; and are still in effect.

The Kentucky Court of Appeals aptly summed up its decision as follows (274 S. W. 2d 395):

> "Conceding for the purpose of this discussion that the certificate which Blue Motor holds from the state has some of the attributes of a property right, that right is neither absolute nor irrevocable. Of some significance is the fact that the certificate must be renewed from year to year. Moreover, the original certificate was issued under a statute which was enacted subject to the constitutional provision which gives cities the final right to grant or to withhold permission to a utility to render an intra-city service using or occupying the city streets. At the time the original certificate was issued to Blue Motor the annexation statute was in effect and even at that time there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area. Hence, Blue Motor's certificate was issued subject to that contingency. When the area was annexed by the city it thereby was removed for most purposes from the jurisdiction of the ~~city~~ State. * * * The right of a city to control the letting of franchises to intra-city utilities is derived from the *Constitution* and to that extent the authority of the city is superior to that of the state."

5. Blue Motor's Specification of the Kentucky Constitutional and Statutory Provisions Which It Claims Impaired the Obligation of Its So-called Contract and Deprived It of Its Claimed Property.

In its Notice of Appeal to this Court, Blue Motor specified that the appeal was taken pursuant to 28 *U. S. C.* § 1257 (2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In its Notice of Appeal and in its Jurisdictional Statement (p. 3), Blue Motor specifies the Kentucky statutes, the validity of which it seeks to draw in question, as follows:

(1) *Kentucky Constitution,* §§s 3, 163 and 164;

(2) *Kentucky Revised Statutes,* §§s 81.100, *et seq.;*

(3) *Kentucky Revised Statutes,* §§s 281.635-(1)-(3) and (6)-(8), 281.665 and 281.010(13).

We shall deal with these specifications of the statutes, the validity of which is questioned, in the inverse order of Blue Motor's statement thereof.

SUMMARY OF POINTS DISCUSSED.

1. **The Provisions of the 1950 Kentucky Motor Transportation Law Attacked by Blue Motor Are Not Unconstitutional.**
2. **The Validity of the Annexation Statutes (*KRS* 81.100, *et seq.*), Under Which Louisville Annexed the Camp Taylor Area Is Beyond Question.**
3. **The Validity of *Ky. Const.* §§s 3, 163 and 164 Is Beyond Question.**
4. **Blue Motor's Argument that the Decision in This Blue Motor Case Will Obstruct the Development Nationally of Public Utility Services Is Completely Irrelevant.**
5. **The Cases Cited by Blue Motor Are Not in Point.**

FIRST POINT.

The Provisions of the 1950 Kentucky Motor Transportation Law Attacked by Blue Motor Are Not Unconstitutional.

On June 15, 1950, a new Kentucky Motor Transportation Law went into effect which (1) abolished the Division of Motor Transportation[7] which had theretofore had jurisdiction over Blue Motor's operation, (2) created the Department of Motor Transportation[8] and conferred upon the Department all administrative functions of the state in relation to motor transportation[9], (3) provided that "no person shall act as a motor carrier without first having obtained a certifi-

[7] *KRS* 281.840.
[8] *KRS* 281.595.
[9] *KRS* 281.600.

cate * * * from the department"[1], and (4) provided for the grandfathering of outstanding certificates into (a) "City Bus Certificates" for "the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes"[2], (b) "Suburban Bus Certificates" for "the operation of motor vehicles carrying passengers for hire within the confines of one or more cities and their suburban area, or a suburban area, over regular routes *but not granting authority to engage in intracity transportation*"[3], and (c) Regular Route Common Carrier Bus Certificates for other operations.

Blue Motor has specified as constitutionally objectionable (a) the 1950 Kentucky Motor Transportation Law section recognizing the constitutional right of Kentucky cities to require the acquisition of city franchises for intracity utility operation (*KRS* 281.635), (b) the grandfathering section (*KRS* 281.665), and (c) the definition of "City Bus" and "City Bus Certificate" section (*KRS* 281.010(13)).

Actually, the situation here involved is exactly the same as it would have been had the 1950 Kentucky Motor Transportation Law never been enacted.

If that Law had not been enacted, Blue Motor at the time of the June 30, 1950 annexation of the Camp Taylor area by Louisville would have held a common carrier certificate authorizing transportation of passengers *"from* Louisville *to* Camp Taylor" but not

[1] *KRS* 281.615.
[2] *KRS* 281.010(13).
[3] *KRS* 281.010(14).

authorizing any *intracity* transportation of passengers in Louisville. Immediately after that annexation, the annexed Camp Taylor area became Louisville and, in terms, the certificate authorizing transportation "*from* Louisville *to* Camp Taylor" would not have authorized intracity transportation but only transportation from Louisville as it then existed to the portion of the Camp Taylor area which Louisville had not annexed.

To engage in *intra-Louisville* transportation in the annexed portion of Camp Taylor, Blue Motor would first have had to acquire a franchise from Louisville as required by *Ky. Const.*, §§s 163 and 164.

The 1950 Kentucky Motor Transportation Law and the provisions complained of made absolutely no change in this situation.

KRS 281.635 simply gave statutory recognition to the established constitutional right of cities under *Ky. Const.*, §§s 163 and 164, to require motor bus operators desiring to engage in intracity transportation first to obtain a franchise from the city. As previously pointed out, the Kentucky Court of Appeals in the *People's Transit* case,[4] *supra*, and a three-judge Federal Court sitting in Kentucky in the *Union Light, Heat & Power case*,[5] *supra*, had clearly stated the existence of this right long before the initial issuance to Blue Motor of its Camp Taylor certificate.

If *Ky. Const.*, §§s 163 and 164 are constitutional, then *KRS* 281.635 is constitutional because it in no wise

[4] *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055.

[5] *Union Light, Heat & Power Co.* v. *Railroad Commission*, 17 F. 2d 148.

broadens the rights conferred in 1891 by the Kentucky Constitution upon Kentucky cities.

KRS 281.665, the grandfathering provision, and *KRS* 281.010(13), the definition of certificate provision, simply assured to carriers operating at the time of the enactment of the 1950 Kentucky Motor Transportation Law that they would receive under new certificates broken down into three classifications, (a) City Bus Certificates, (b) Suburban Bus Certificates, and (c) Regular Route Common Carrier Bus Certificates, exactly the same rights which they previously had under their old general common carrier certificates. Certainly, no Federal constitutional question can arise from this grandfathering provision assuring to Blue Motor the same rights it had before the enactment of the 1950 Kentucky Motor Transportation Law.

On June 15, 1950, and for all previous years of its operation, Blue Motor's operation "from Louisville to Camp Taylor" had been exclusively of the type covered by the newly created "Suburban Bus Certificate." On June 15, 1950, the effective date of the 1950 Kentucky Motor Transportation Law, Blue Motor was entitled only to be grandfathered into a "Suburban Bus Certificate" permitting it to operate "from Louisville to Camp Taylor" over regular routes "but not granting authority to engage in intracity transportation." In fact, under *KRS* 281.615, which provided that "no person shall act as a motor carrier without first having obtained a certificate * * * from the department", Blue Motor was obligated to apply for a new Suburban

Bus Certificate before continuing its operations after June 15, 1950.

It is thus clear that had Blue Motor complied with the law and on June 15, 1950 applied for a new certificate covering its then and prior operations (*as Louisville Transit Co. actually did*), Blue Motor could only have been issued a Suburban Bus Certificate in lieu of its old common carrier certificate authorizing it to operate "from Louisville to Camp Taylor"; and that new Suburban Bus Certificate would have fully and completely conferred upon Blue Motor all rights it had ever had or claimed under its old common carrier certificate. Consequently, Blue Motor could then have been grandfathered into nothing except a "Suburban Bus Certificate."

Blue Motor's dereliction in failing to apply for a Suburban Bus Certificate until February 7, 1951, which was over 7 months after June 15, 1950, the effective date of the 1950 Kentucky Motor Transportation Law, and was over 6 months after June 30, 1950, the date on which Louisville annexed the Camp Taylor area, cannot broaden Blue Motor's grandfathering rights, which became effective on June 15, 1950, under the new Law.

It is true that on June 30, 1950, 15 days after the effective date of the 1950 Kentucky Motor Transportation Law, Louisville annexed substantially all of the Camp Taylor area. The fact that this annexation occurred 15 days after the effective grandfathering date of June 15, 1950, instead of 15 years thereafter, is of no moment in so far as the grandfathering provision of the 1950 Kentucky Motor Transportation Law is con-

cerned. Consequently, any subsequent attempt to broaden Blue Motor's old common carrier certificate or the new Suburban Bus Certificate into which that old common carrier certificate was entitled to be grandfathered on June 15, 1950 into a City Bus Certificate is without any basis whatsoever under the provisions of the 1950 Kentucky Motor Transportation Law.

This case must be decided just as if Blue Motor under the grandfathering provisions had applied for and had obtained a Suburban Bus Certificate on June 15, 1950, covering its operations "from Louisville to Camp Taylor" and had held and was operating under that Certificate on June 30, 1950, when Louisville annexed the Camp Taylor area.

Grandfathering has no bearing on the constitutional question.

SECOND POINT.

The Validity of the Annexation Statutes (*KRS* 81.100, *et seq.*), Under Which Louisville Annexed the Camp Taylor Area, Is Beyond Question.

The Annexation Statutes were enacted in 1893;[6] were in effect when Blue Motor's certificate to operate from Louisville to Camp Taylor was first issued; were in effect on June 30, 1950, when Louisville annexed the major portion of the Camp Taylor area; and are presently in effect in essentially the same form.

Consequently, there can be no question but that the Annexation Statutes under which Louisville was empowered to annex the Camp Taylor area became a

[6] *Acts* 1893, c. 244.

part of Blue Motor's common carrier certificate when initially issued and remained a part thereof on each annual renewal thereof as fully as if that certificate had specifically provided that it was issued subject to the right of annexation by Louisville and Louisville's then right to require Blue Motor to acquire a franchise from Louisville before conducting intracity transportation in Louisville.

In *Williams* v. *Nall,* 108 Ky. 21, 55 S. W. 706 (decided 1900), the Court of Appeals of Kentucky read an 1856 Act into a corporate charter and thereby applied the rule that statutes and constitutional provisions in effect at the time a contract is entered into became a part of the contract.

In *City of Henderson* v. *Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332 (decided 1923), the Kentucky Court of Appeals had said (254 S. W. 333):

> "But the parties are presumed to know the law and contract with reference thereto and that law becomes as much a part of the contract as if written in it."

As far back as 1873, in *Rees* v. *City of Watertown,* 19 Wall. 107, this Court said (19 Wall. 121):

> "All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other."

Similarly, in *Armour Packing Co.* v. *United States,* 209 U. S. 56, this Court said (209 U. S. 82):

> "The statute being within the constitutional power of Congress, and being in force when the

contract was made, is read into the contract and becomes a part of it."

Certainly there can be no impairment of contract by a statute in existence at the time the contract was made and which therefore became a part of the contract. *KRS* 81.100, *et seq.*, specified by Blue Motor as impairing the obligation of its one year annually renewable common carrier certificates, were enacted in substantially their present form some 42 years before Blue Motor's certificate was first issued.

THIRD POINT.

The Validity of *Ky. Const.* §§s 3, 163 and 164 Is Beyond Question.

Ky. Const., § 3, which provides that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment", and *Ky. Const.*, § 163, which withholds from the legislature and confers upon cities the exclusive power to grant franchises for intracity operations, and *Ky. Const.*, § 164, which prescribes the method by which cities can create and grant franchises, were all adopted in 1891; were in effect at the time Blue Motor's common carrier certificate was initially issued; were in effect on June 30, 1950, when Louisville annexed the Camp Taylor area; and are presently in effect in verbatim language.

Prior to the issuance of Blue Motor's common carrier certificate in 1935, the Kentucky Court of

Appeals in the *People's Transit* case[7], *supra,* held that *Ky. Const.,* § 163 deprived the Kentucky legislature of any right to grant a privilege, certificate or franchise to a motor bus company to engage in intracity transportation of passengers in Louisville; conferred that right exclusively upon Louisville; and permitted Louisville Transit Co.'s principal predecessor, Louisville Railway Co., which then held, as Louisville Transit Co. now holds, a city-wide franchise from Louisville, to enjoin a competing motor bus operator from engaging in the intracity transportation of passengers in Louisville without a franchise from Louisville created and granted in accordance with the methods prescribed by *Ky. Const.,* § 164.

As in the case of *KRS* 81.100, the Annexation Statutes, *Ky. Const.,* §§s 3, 163 and 164 became a part of Blue Motor's common carrier certificate when issued and remained a part thereof upon each annual renewal thereof as fully as if that certificate had had written therein the express provision that it was issued and remained subject to the right of Louisville to annex the Camp Taylor area and the right of Louisville or its city-wide franchise holder to prevent Blue Motor from operating in any part of the Camp Taylor area which might be annexed by Louisville until it first obtained a franchise from Louisville.

The Kentucky constitutional provisions and the Kentucky Annexation Statutes cannot have impaired Blue Motor's one year annually renewable common

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[7]*People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055.

carrier certificate, even if it should be given the dignity of a contract, because not one of those constitutional or statutory provisions were enacted after the initial issuance of Blue Motor's Camp Taylor certificate.

In *Fleming* v. *Fleming,* 264 U. S. 29 (decided 1924), this Court held that unless subsequent legislation was asserted to have impaired a contract, no substantial Federal question as to impairment of contract was raised.

In *Barrows* v. *Jackson,* 346 U. S. 249, this Court said (346 U. S. 260):

> "It is contended by petitions that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: 'No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.' The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only.
>
> " 'It has been settled by a long line of decisions, that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts * * *.' "

The decisions by the Kentucky Court of Appeals in this *Blue Motor* case[8] is no new decision, but is simply a reaffirmation of the law Kentucky has previously settled in the *People's Transit* case,[9] *supra,* and in the

[8] *Whitaker, et al.* v. *Louisville Transit Co.,* 274 S. W. 2d 391.
[9] *People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055.

Union Light, Heat & Power case,[1] *supra,* and even if there could be impairment by judgment as well as by legislation, the judgments of the Kentucky Court of Appeals in the *People's Transit* case and of the three-judge Federal Court sitting in Kentucky in the *Union Light, Heat & Power* case were both rendered long before the initial issuance of Blue Motor's Camp Taylor certificate and the present *Blue Motor* decision is simply a recognition and reaffirmation of the law as established in those cases.

Similarly in *United States Fidelity & Guaranty Company* v. *Oklahoma,* 250 U. S. 111 (decided 1919), this Court held that for subsequent state legislation to be held invalid it must appear that the *subsequent* legislation complained of as impairing the contract, rather than earlier laws, furnished the ground of decision in the state courts.

The only subsequent legislation which Blue Motor refers to are the designated sections of the 1950 Kentucky Motor Transportation Law with which we have previously dealt. As hereinbefore shown, none of those sections affected, in the slightest degree, any right which Blue Motor then had under its certificate.

Just as there is no impairment of contract by statutory and constitutional provisions in effect at the time of the initial issuance of Blue Motor's Camp Taylor certificate, similarly there can be no deprivation of any property of Blue Motor without due process by virtue of those constitutional and statutory provisions

[1] *Union Light, Heat & Power Co.* v. *Railroad Commission,* 17 F. 2d 148.

which became a part of the very one year annually renewable common carrier certificate authorizing Blue Motor to transport passengers "from Louisville to Camp Taylor" which it now asserts constitutes some form of property.

It is again to be noted that the annexed Camp Taylor area upon annexation became Louisville and thereafter the Camp Taylor certificate in terms only authorized the transportation of passengers from Louisville to the then remaining unincorporated portions of the Camp Taylor area.

FOURTH POINT.

Blue Motor's Argument that the Decision in This Blue Motor Case Will Obstruct the Development Nationally of Public Utility Services Is Completely Irrevelant.

Blue Motor argues at length that the decision in this Blue Motor case will seriously impair the provision of public utility services for suburbs bordering American cities; will make regulatory agencies powerless to provide guaranties necessary to attract such service; and will, therefore, obstruct the development of such public utility service nationally.

The short and simple answer to that argument is that the provisions of the Kentucky Constitution and statutes apply only to Kentucky and that notwithstanding those provisions which have been in effect since 1891 and 1893, respectively, Kentucky has suffered from no lack of provision of utility service.

Kentucky's method of dealing with urban transportation in annexed areas is that such transportation must be under franchise granted by the annexing city. That may not be the only method, or even the best method, of handling the situation, but it is Kentucky's method unequivocally set forth in *Ky. Const.* §§s 163 and 164.

Furthermore, it is a solution for the situation that Kentucky was perfectly free to adopt. Blue Motor was fully aware of Kentucky's method of dealing with the situation when it applied for and received its first certificate, and cannot now successfully attack that method under the Federal Constitution.

FIFTH POINT.

The Cases Cited by Blue Motor Are Not in Point.

Blue Motor has cited a hodge-podge of cases which either involve (1) statutes enacted subsequent to the execution of the contract impaired or the acquisition of the property in question, or (2) constitutional and statutory provisions wholly different from those of Kentucky which it attacks.

Detroit United Railways v. *Michigan*, 242 U. S. 238, dealt with a situation wherein Detroit United Railways (which was organized under an act permitting it to acquire the roads and franchises of other street railways and enjoy them upon the same terms as the other street railways had enjoyed them) acquired a street railway operating under a franchise from Detroit and street railways operating under franchises from outlying villages. The fares specified in the outlying vil-

lages' franchise ordinances were higher than was the fare specified in an 1889 supplement to the Detroit franchise ordinance.

In 1905 and 1907, the Michigan legislature by special acts annexed portions of the villages into Detroit and provided that the annexed territories should be subject to all ordinances of the city.

It was contended that this required Detroit United Railways to operate in the portions of the villages which had been annexed at the lower fare specified in the Detroit franchise ordinance, instead of at the higher fare specified in the villages' franchise ordinances.

The Supreme Court, of course, held that this subsequent legislation could not substitute the Detroit fare for the villages' fares.

The other Supreme Court cases cited by Blue Motor are similarly without bearing upon the issues in this case.

Blue Motor similarly *erroneously cites Town of Fultondale* v. *Clelland Bus Lines,* 254 Ala. 225, 48 So. 2d 21, as deciding in favor of Blue Motor "the precise question involved in the case at bar."[2]

That case decides no such thing.

There, Clelland Bus Lines acquired bus operating certificates over certain state highways, not specifying the size of the busses. Thereafter, Fultondale was incorporated, including portions of those highways, and undertook to prohibit the operation of taxicabs over its streets, except under permit from the town council,

[2]Blue Motor Jurisdictional Statement, p. 14.

and defined taxicab as a "public service automobile designed to seat 7 passengers or less."

Clelland Bus Lines endeavored to operate two 5-passenger automobiles in Fultondale under its state certificate without securing the required municipal permit.

The trial court enjoined it from engaging in intracity transportation with those 5-passenger cars without obtaining a permit from Fultondale, but refused to enjoin it from using those two 5-passenger cars for the transportation of passengers between Fultondale and points outside of Fultondale, nothwithstanding the fact that the *Alabama Constitution* § 202 provided that no person should use the streets of any town without first obtaining the consent of the town.

Clelland Bus Lines did not appeal from the trial court's decision as to intracity operations. Upon appeal by the city, the appellate court affirmed the trial court's decision as to the remainder of the operation.

This Alabama case does involve a constitutional provision (*Ala. Const.*, § 220) which is somewhat similar to *Ky. Const.* §§s 163 and 164. The difference, however, is that the Kentucky Court of Appeals has held that *Ky. Const.*, §§s 163 and 164 are (1) "self-operative" (*Irvine Toll Bridge Co.* v. *Estill County*, 210 Ky. 170, 174, 275 S. W. 634, 636); and (2) "withheld the right of the Legislature to grant the franchise for purely intraurban operations, and conferred that right exclusively upon the city authorities" (*People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 736, 295 S. W. 1055, 1058); whereas the Alabama Supreme

Court has held (1) that *Ala. Const.*, § 220, "was not intended to divest the state of its sovereign power and invest it in cities" (*Ex Parte Ashworth*, 86 So. 84, 85; *City of Mobile* v. *Farrell, et al.*, 158 So. 539, 540-541); and (2) has said: "The cities derived their authority to grant franchises from the legislature" (*Phenix City* v. *Alabama Power Co.*, 195 So. 894, 899).

It is thus seen that this Alabama case is no authority contrary to the well-established Kentucky rule. Even if the Alabama law was contrary to the Kentucky law, that would create no Federal constitutional question.

Blue Motor makes the utterly amazing statement[3] that "no case has been found where the utility serving a suburb was ousted because of territorial annexation."

Louisville Transit Co. happened to cite several such cases in its briefs before the Kentucky Court of Appeals, namely: *Evergreen Trailways, Inc.* v. *City of Renton*, 38 Wash. 2d 82, 228 P. 2d 119 (1951), and *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S. W. 2d 206 (1933). See also *San Francisco-Oakland Terminal Railways* v. *Alameda County, et al.*, 66 Calif. App. 77, 225 P. 304 (1924), and *City of Wichita Falls* v. *Bowen*, 143 Tex. 45, 182 S. W. 2d 695 (1944).

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[3]Blue Motor Jurisdictional Statement, p. 14.

CONCLUSION.

When Blue Motor obtained its first one year annually renewable certificate, it took that certificate subject to the known possibilities (1) that Louisville might annex the adjacent Camp Taylor area; (2) that if it did so, Blue Motor could not continue to operate intracity in that area without obtaining a franchise from Louisville; (3) that the city-wide carrier holding a city-wide franchise could extend its service into the annexed Camp Taylor area; and (4) that either Louisville or its city-wide carrier, Louisville Transit Co., could enjoin Blue Motor from continuing its operating intracity in Camp Taylor as they have done.

Those provisions and conditions of the Kentucky law *ipso facto* became a part of the Blue Motor certificate upon its original issuance.

Consequently, this appeal does not present a substantial Federal question and should be dismissed.

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June 1, 1955.

No. 62

FILED
JUN 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

RAY WHITAKER and HARRY L. SWAIM, doing business as Blue Motor Coach Lines, *Appellants,*

v.

LOUISVILLE TRANSIT COMPANY, the CITY OF LOUISVILLE, and the DEPARTMENT OF MOTOR TRANSPORTATION, COMMONWEALTH OF KENTUCKY, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

REPLY TO MOTION TO DISMISS

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

REPLY TO MOTION TO DISMISS

Of the three appellees, only Louisville Transit Co. has filed a motion in opposition to the Jurisdictional Statement. In the proceedings and appeals below, where the issues were broader,[1] the City of Louisville

[1] In all the proceedings below, the principal issue was Louisville Transit's right to operate over the route in question. By way of counterclaim, Louisville Transit attacked appellants' operating privileges. It is only the adverse decision on the "counterclaim" which is being appealed here (Jurisdictional Statement, pp. 6-7).

generally aligned itself with Louisville Transit, but here the City has not offered any objection to plenary consideration of the constitutional issues involved. Appellee Department of Motor Transportation, Commonwealth of Kentucky, which, as an administrative agency, upheld the position taken by appellants in this Court, and which, through the Attorney General of the Commonwealth, supported this view through the state courts, has likewise raised no objection in this Court to acceptance of jurisdiction. Both the City and the Commonwealth Department supported appellants' motion for a stay submitted to Mr. Justice Reed.

Louisville Transit's brief, appended to its motion to dismiss, undertakes to restate the facts, and to present arguments on procedural and substantive grounds. Appellants here submit their reply, in which they deal with the principal points made by Louisville Transit, to the extent not already covered by the Jurisdictional Statement.

1. LOUISVILLE TRANSIT'S BASIC ARGUMENT: PRIOR NOTICE

The main burden of Louisville Transit's argument, both as to substance and as to appellate procedure, is that some of the Kentucky constitutional and statutory provisions cited in the Notice of Appeal were in effect when appellants obtained their first certificate of convenience and necessity in 1935, and therefore cannot be considered either to have impaired vested rights, or to constitute such state statutory action as to provide the basis for review on appeal. On the substantive side, "prior notice" was also the central point of the opinion below.

The argument is specious. Nothing in the Kentucky statutory scheme of 1935 gave the slightest hint of what the legislative changes of 1950-51 were to be construed to mean in 1955 by a divided Kentucky court.

Of what can appellants be said to have been forewarned in 1935? Of the provisions relied upon by the court below, and which, as so construed, are here challenged on appeal, Ky. Const. §§ 3, 163 and 164, and KRS (1954) §§ 81.100, et seq., were in effect in the same or substantially the same form in 1935 as they are today.

Section 3 of the Kentucky Constitution simply provides that privileges granted are not to be exclusive, and are subject to revocation, alteration or amendment. Appellants ask here for no exclusive privilege; it is Louisville Transit, not content with having intruded on appellants' long-established service, which seeks monopoly. Decisions of this Court rendered long before 1935 have established that a reserved power to alter, amend or repeal cannot be used to impair vested rights. *Chicago M. & St. P. R. Co.* v. *Wisconsin*, 238 U.S. 491 (1915); *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125 (1923); see also *Coombes* v. *Getz*, 285 U.S. 434 (1932).

Sections 163 and 164 of the Kentucky Constitution provide, as they did in 1935:

> Sec. 163. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the con-

sent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has, in good faith, been begun thereunder, the provisions of this section shall not apply.

Sec. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

These provisions simply served notice that if the Camp Taylor area (then unincorporated territory) were ever to be incorporated into a municipality, that municipality would have certain "home rule" powers. Appellants do not dispute the assignment of regulatory jurisdiction by Kentucky between state-wide and municipal agencies. But such an assignment of jurisdiction neither gives any hint nor expresses any intent that it is to be accompanied by a destruction of one man's operating privileges in favor of another. If anything, the proviso at the end of section 163 might be taken to have given reassurance to reasonable men of a purpose to protect, not to destroy, vested rights. Alabama has read just such a constitutional provision to protect a bus company's vested certificate rights against impairment by a municipality which later acquired governmental jurisdiction over the area. *Town of Fultonsdale* v. *Clelland Bus Lines*, 254 Ala. 225, 48 So. (2d) 21 (1950). See also *City of Prichard*

v. *Alabama Power Co.,* 234 Ala. 339, 175 So. 294 (1937).

The Kentucky statutes in effect in 1935 made elaborate provision for the annexation of territory by cities of each of the six classes of municipalities. The larger cities could annex smaller ones, as well as unincorporated territory. Carroll's Ky. Stat. (1935) §§ 2761-64, 3050-54, 3287, 3483, 3611-14, 3664-67. These provisions are in effect today without significant change. KRS (1954) §§ 81.100-81.270. Did these provisions serve fair warning on appellants that (a) the territory served by their route would some day be annexed, (b) that such annexation would be by Louisville and not by another city, (c) that Louisville would in the interim (1942) have granted a "city-wide" 20-year franchise to Louisville Transit without making explicit provision therein for the event of annexation, and (d) that the Court of Appeals would reach the conclusion that such an annexation divests the appellants of actively-used operating rights in favor of the later Louisville Transit franchise, interpreted to expand with the city boundaries? The court below said, without a scintilla of evidence in the record to support the assertion, " . . . even at that time [1935] there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area." The statutes warned that annexation might occur, but only in the sense that every acre of Kentucky might be annexed at some vague future time to some municipality. It was equally probable that Camp Taylor might form a new and separate municipality under Carroll's Ky. Stat. (1935) §§ 3713-16. It has been known for 100 years that Texas is free to divide itself into several states. It does not follow that every Texas

utility is now on notice that in such event it can be summarily ousted of its franchises.

Louisville Transit sought to buttress its argument on "prior notice" by citing *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S.W. 1055 (1927), no less than eight times (Brief, pp. 2, 6-7, 9, 15, 21, 22-23, 27). In that case, a corporate predecessor of Louisville Transit sought legal relief against the competition of a rival passenger bus operator. But at that point the similarity with the case at bar ends. No state certificate, no annexation of territory, no long established service were involved. The case simply held that the city might not authorize bus service by ordinance; it must take competitive bids under Ky. Const. § 164, quoted supra at p. 4. The case is quite irrelevant to the issues here presented.

These were the provisions of Kentucky law in effect in 1935. It is submitted that (a) as a matter of substantive law, they cannot be said to have subordinated appellants' contractual or property rights to a future franchise, granted in 1942, expressly non-exclusive, and expanded by later court decision to follow the expanding boundaries of Louisville, and (b) as a matter of appellate procedure, they cannot be considered to be, by themselves, the operative Kentucky statutes which deprived appellants of their rights.

If we look at the events of 1950-51, we get quite another picture. The 1950 general revision of the motor carrier statute created for the first time the classification of some motor bus certificates as "city" and "suburban." KRS (1954) §§ 281.010 (14), (15). This new classification introduced such a discontinuity into the form of bus certificates as to require an explicit new "grandfather clause." KRS (1954) § 281.665.

The text of the new clause was sufficiently ambiguous to open the way to the casuistic reasoning which Louisville Transit has pursued throughout this case: that because Camp Taylor was not a city on June 14, 1950, appellants could not have secured a "city bus certificate" under the grandfather clause on June 15, 1950, when the new motor carrier statute became effective; that because appellants held no "city bus certificate" on July 1, 1950, when Camp Taylor became part of a city, they could have no "grandfather" rights to their old route because only a "city" certificate carried "grandfather" rights in a city.

The motor carrier statute of 1950, the Louisville annexation of Camp Taylor in 1950, the city's purported authorization to Louisville Transit in 1951 to extend its route into Camp Taylor,[2] and the refusal of Louisville in 1951 to entertain appellants' application for a franchise (R. 74-75, 198-99, 252-53, 264, 271, 292-311) were the operative acts which precipitated the decision below. Each of these acts is deemed a state statute, which, as applied to appellants, may be challenged on appeal under 28 U.S.C. § 1257(2). *King Manufacturing Co.* v. *Augusta,* 277 U.S. 100 (1928); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921). Of course, the decision below is also reviewable on certiorari under 28 U.S.C. §§ 1257(3), 2103.

Apart from the argument that the appellants were "on notice" in 1935, Louisville Transit offers no

[2] Louisville Transit wrote a letter to a city official announcing its intention of extending its service into the Camp Taylor area. Two officials signed in the corner under the word "approved" (R. 466). No further consideration of the problem is shown by the record.

serious challenge to the showing of impairment of constitutional rights. *Detroit United Railway* v. *Michigan*, 242 U.S. 238 (1916), after a page of explanation (Louisville Transit Brief, pp. 25-26) is still, obviously, directly in point, and decisive as a precedent. *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929), equally decisive, is not even mentioned. It has been similarly held that municipal annexation cannot constitutionally impose new burdens on a utility in the annexed territory. *Georgia Railway & Power Co.* v. *Decatur*, 262 U.S. 432 (1923); *Georgia Railway & Power Co.* v. *College Park*, 262 U.S. 441 (1923). These cases clearly and definitively establish that the construction of the court below impairs the obligation of appellants' contract and deprives them of their property without due process of law.

As this Court said in *Los Angeles* v. *Los Angeles Gas & E. Co.*, 251 U.S. 32, 39-40 (1919):

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. . . . It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th Amendment forbids."

2. A RATIONAL UTILITY POLICY FOR ANNEXED SUBURBS

The court below created a dilemma for itself, and then resolved it in blunderbuss fashion. The argument of each of the opposing parties was characterized as "a sound and logical principle of law considered

in the abstract." The court conceded, albeit grudgingly, that appellants' certificate ". . . has some of the attributes of a property right . . ."[3] But since it construed Louisville Transit's franchise to expand with the city's boundaries,[4] and since each party in the state court sought the exclusion of the other,[5] the Court of Appeals reasoned that it must choose the "superior right." In doing so, it is submitted, guaranties under the Federal Constitution were violated.

The state administrative agency had pointed the way to a rational and practical solution of the problem without the creation of an unnecessary dilemma. It ruled that both carriers might serve the route in competition. This situation has prevailed from early 1951 to date. Since Louisville Transit's only claim to operating rights, its franchise, is expressly non-exclusive, it could have no plausible objection.

Appellants have sought from the earliest stages of this case to accept city regulatory jurisdiction, to secure a city franchise, and to pay reasonable compensation for such a franchise. They applied promptly for a franchise, and pressed their application repeatedly, but the city has taken no action, apparently consider-

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[3] The same court has held long before that such a certificate was quite definitely a property right. *Reo Bus Lines* v. *Southern Bus Lines*, 209 Ky. 40, 272 S.W. 18 (1925).

[4] *Truesdale* v. *City of Newport*, 28 K.L.R. 840, 90 S.W. 589 (1906), held that a utility's franchise automatically extended to annexed territory. However, no competing operating rights were there involved; no other service was offered in the annexed territory.

[5] In this Court, appellants only claim constitutional protection for non-exclusive operating rights; they do not here challenge so much of the decision below as permits Louisville Transit to operate.

ing that its non-exclusive franchise to Louisville Transit excluded any franchise to a competitor.[6]

Faced with a similar problem, the highest court of Alabama came to the opposite conclusion from that of the majority of the Kentucky court:

> "Here, the provisions of § 220 of the Constitution were not applicable to the parts of the roads in question at the time the respondent bus company secured its certificate of public convenience and necessity, for the reason that the town of Fultondale was not then in existence. Respondent's right to operate over said roads was not superseded by the subsequent incorporation of the complainant town. City of Pritchard v. Alabama Power Co., 234 Ala. 339, 175 So. 294." *Town of Fultonsdale* v. *Clelland Bus Lines,* 254 Ala. 225, 227-28, 48 So. (2d) 21, 22 (1950).

Section 220 of the Alabama Constitution[7] is very similar to Section 163 of the Kentucky Constitution, quoted supra at pp. 3-4. As recently as 1950, the Kentucky Court of Appeals turned to Alabama precedents in another case, because the Kentucky Constitution was so largely followed in the drafting of the Alabama Constitution. *City of Bowling Green* v. *Davis,* 313 Ky. 203, 209-10, 230 S.W. (2d) 909, 912-13 (1950).

What is involved here is much more than a just resolution of a dispute between competitors. What is at stake is a rational legal structure to permit our suburbs to secure utility and transportation services. The decision below serves notice on any utility undertaking to serve a suburb that its operating privileges can be wiped out by any future annexation of the territory to the adjoining city. No avenue of security was

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[6] R. 74-75, 198-99, 252-53, 264, 271, 292-311.

[7] Text given in the Jurisdictional Statement, p. 14, n. 10.

left open for such a prospective utility. A state agency's grant would terminate if the area were annexed to a city; the city could hardly grant a franchise when the area is not, and may never be, part of the city.

These considerations of far-reaching public significance Louisville Transit characterizes as "irrelevant," and it offers only the laconic observations that (1) Kentucky has not suffered from lack of utility services, and (2) Kentucky is free to allocate jurisdiction between state and municipal officials as it pleases.

These observations are beside the point. (1) Of course, Kentucky has not yet suffered from the decision below; it was rendered only a few months ago, and is now here on appeal. (2) Kentucky's allocation of governmental responsibility is not in issue here; what is in issue is the destruction of vested rights which the court below considers a necessary consequence of a transfer of jurisdiction.

The consequences envisaged for the doctrine declared below have not been seriously disputed because they cannot be gainsaid. That decision inevitably means that the Surburban Gas Company will have to dig out its pipes and make way for the pipes of the City-Wide Gas Company when the City annexes the Suburb. With thousands of municipal annexations taking place throughout the country annually (Jurisdictional Statement, p. 13), the national importance of the question here at issue can hardly be overestimated.

3. THE FACTS AND CERTAIN PRECEDENTS

By constant repetition of the statement that appellants' operating certificate, from the beginning, excluded the carriage of Louisville intracity passengers (Louisville Transit's Brief, pp. 1-2, 3, 6, 9, 14-15, 16),

Louisville Transit's Brief may tend to give the impression that appellants are here seeking an expansion of their operating authority.[8] Appellants ask only to be permitted to continue to offer the exact service which they have now provided for 20 years, no more and no less. They have never offered passage wholly within the old (pre-1950) Louisville boundaries, and they make no claim here to be permitted to do so. They have always offered passage between downtown Louisville and the Camp Taylor area annexed to the City in 1950; they ask only the privilege of continuing to do so. Appellants seek no expanded authority. It is only the enlargement of the City boundaries which has made most of appellants' route an intracity one. Appellants contend that such a boundary change cannot constitutionally deprive them of vested operating rights.

Again by constant repetition, Louisville Transit's brief seeks to minimize the status of appellants' operating certificate by referring to it as an "annually renewable certificate" (pp. 1, 3, 9, 19, 20, 21-22, 24, 29). All certificates issued by the Kentucky Department of Motor Transportation have been renewable annually, but such renewal is a matter of right, as fully explained in the Jurisdictional Statement (pp.

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[8] In fact, the certificates held by appellants from 1935 to the institution of this case never contained language excluding intracity carriage, R. 447. Note the loose use of quotation marks by Louisville Transit:

> . . . Blue Motor was entitled only to be grandfathered into a "Suburban Bus Certificate" permitting it to operate "from Louisville to Camp Taylor" over regular routes "but not granting authority to engage in intracity transportation." (Brief, p. 16.)

The phrase first quoted is from the statute, the second quotation from appellants' certificate, and the third from the statutory definition of the first.

18-19). Annual renewal serves as a convenient way for the Department to collect the prescribed small annual fee required by statute. KRS (1954) § 281.650 (5).

References in Louisville Transit's brief to the quality of appellants' service,[9] and the suggestion of some "dereliction" on appellants' part in failing to make timely application for the new form of certificate after the 1950 statute became effective[10] are quite out of place. None of the decisions below gave any consideration to these arguments. Certainly they are irrelevant here on appeal on constitutional issues.

No precedents for the ouster of an established public utility upon annexation of its territory, under circumstances analogous to the case at bar, have been cited. *San Francisco-Oakland Terminal Rys.* v. *Alameda County,* 66 Cal. App. 77, 225 Pac. 304 (1924), cited by Louisville Transit, was a dispute between county and city over the franchise revenues; neither side disputed the validity of the franchise. *City of Wichita Falls* v. *Bowen,* 143 Tex. 45, 182 S.W. (2d) 695 (1944), cited here by both sides, involved the rate of fare; neither party contested the established utility's right to operate. In *Evergreen Trailways* v. *City of Renton,* 38 Wash. (2d) 82, 228 P. (2d) 119 (1951), the established utility was given the opportunity to bid

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[9] Louisville Transit offered some witnesses who complained of appellants' service (R. 413-43). Appellants challenged the relevance of such evidence in this case, and offered none in rebuttal (R. 325-26, 413-19). In fact, appellants estimate that in open competition during the pendency of this case they have been carrying about 2/3 of the traffic on this route, despite a higher fare.

[10] The new state agency created by the 1950 statute took a while to prepare the new forms, procedures, etc. (R. 331-34).

for a city franchise, but was outbid by another. In *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S.W. (2d) 206 (1933), the older utility apparently sought not to preserve an area-wide service, but to use its transmission line along a state highway as a touchstone for elaborating a city-wide service.

CONCLUSION

It is submitted that the appeal is well taken, that appellants have been deprived of constitutional rights by the decision below, that the questions presented are of fundamental significance in the adjustment of basic public utility services required by the most fundamental population trend of this generation, and that the issues merit plenary consideration by this Court for their resolution.

Respectfully submitted,

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